Supreme Court, U.S.
FILED
JAN 27 1999
CLERK

No. 98-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TECHNICAL SERGEANT FRANK S. HALL, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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3588

QUESTION TO BE PRESENTED IN PETITION

Whether, after waiting for over a year for the evidentiary rehearing it ordered in *United States v. Hall* 45 M.J. 255 (CAAF 1996), the United States Court of Appeals for the Armed Forces erred, by dismissing as moot, two pending motions for dismissal (for a speedy trial violation and for prosecutorial misconduct) when the Supreme Court's decision in *United States v. Scheffer*, __ U.S. __, 118 S.Ct. 1261 (1998) mooted the underlying issue that precipitated the rehearing.

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OPINIONS BELOW

The petitioner, Technical Sergeant Frank S. Hall, respectfully prays that a writ of certiorari issue to review the final order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 29 September 1998. This Honorable Court granted an extension in time to file this request until 27 January 1999.

The order and judgment of the United States Court of Appeals for the Armed Forces, is not yet reported, but is attached at Appendix A. The Court's initial decision is reported at *United States v. Hall,* 45 M.J. 255 (1996) and is attached at Appendix B. The other relevant orders of the Court of Appeals of the Armed Forces are attached at Appendixes C through H.

JURISDICTION

The final judgment of the United States Court of Appeals for the Armed Forces was entered on 29 September 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3). On 21 December 1998, the Chief Justice extended the time for filing this writ of certiorari to and including January 27, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment of the Constitution of the United States provides, in relevant part:

> "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Speedy Trial clause of the Sixth Amendment of the Constitution of the United States provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

STATEMENT OF THE CASE

Technical Sergeant Hall was tried by General Court-Martial from 25 to 27 November 1991 at Spangdahlem Air Base in Germany for theft of government tools. Contrary to his pleas, he was found guilty by a Military Judge sitting alone. At trial, TSgt Hall admitted that he took the tools, but explained that he intended to return them (wrongful appropriation vs. larceny). He offered an exculpatory polygraph as corroboration of his sworn testimony that he had no intent to permanently deprive the Air Force of the tools. At trial, the Military Judge refused to allow the defense the opportunity to lay the foundation necessary for the polygraph evidence. The Military Judge relied on Military Rule of Evidence 707 to exclude the polygraph evidence.

On 30 September 1996, the United States Court of Appeals for the Armed Forces "set aside" TSgt Hall's conviction. *U.S. v. Hall* 1994 CAA Lexis 51 at Appendix H overturned by *U.S. v Hall,* 45 M.J. 255 (C.A.A.F. 1996). The Court held that TSgt Hall was entitled to an opportunity to lay a foundation for the exculpatory polygraph evidence he proffered at trial. *Id* at 257. *See also United States v. Scheffer,* 44 M.J. 442 (C.A.A.F. 1996). The Court directed the record of trial be "returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a Military Judge." *Hall* at 257

United States v. Hall was not the first case where the Court of Appeals for the Armed Forces ordered the Air Force to hold a rehearing on the issue of admissibility of exculpatory polygraph evidence. The Court of Appeals for the Armed Forces had ordered a rehearing in *U.S. v. Scheffer* only 12 days earlier. The Air Force prosecutors appealed the rehearing decision in *Scheffer* to this Honorable Court, but, for their own reasons, they did not appeal the rehearing order in *Hall.*

Then, instead of holding the rehearing in a timely manner, the Air Force prosecutors neglected to hold the rehearing for over 400 days. During this delay TSgt Hall made two requests for extraordinary relief to the Court of Appeals for the Armed Forces. In his first request TSgt Hall asked for dismissal of the charges against him for prosecutorial misconduct associated with the motivations of the prosecutors in attempting to, without authority, recall him to active duty. In his second request, TSgt Hall asked the Court of Appeals for the Armed Forces to dismiss his case for violation of the speedy trial rule (R.C.M. 707 – Attachment I) and the Sixth Amendment.

Before the Court of Appeals for the Armed Forces ruled on these motions, each of which had the potential to dismiss the case, this Honorable Court decided *United States v. Scheffer*, __U.S. __, 118 S.Ct. 1261 (1998). *Scheffer* overruled the Court of Appeals for the Armed Force's decision on polygraph evidence. This holding mooted the basis for TSgt Hall's rehearing. In turn, the Armed Forces Court of Appeals mooted the dispositive motions pending before it. CAAF Order of 22 May 1998 at Appendix D.

ARGUMENT

The Speedy Trial Issue – A 400 plus Day Delay

On 14 May 1997, when the convening authority ordered TSgt Hall's rehearing, two hundred and twenty-six days had passed since the 30th of September 1996 when the Court of Appeals for the Armed Forces ordered the rehearing. It was then an additional 183 days later before the government even "attempted" to hold the rehearing. The rehearing was only "attempted" because it was "abated" by the Military Judge. She ruled that the convening order was improper and, as such, there was no authority to hold the rehearing. During the "abated" rehearing, the Military Judge refused to rule on the defense motion to dismiss the case for a violation of the speedy trial

rule (R.C.M. 707), and the Sixth Amendment of the Constitution. The Military Judge did not rule on the speedy trial motion because she concluded the convening order error did not give her authority to rule. (Rehearing transcript at page 28 at Appendix J) During this entire 409-day period the defense never requested any delay. After the termination of the "abated" rehearing, a new convening order was issued and the next rehearing was set for mid-February.[1]

The Prosecutorial Misconduct Issue

On 18 December 1997, over one month after the abated rehearing, pursuant to the alleged "authority" of the convening authority's Judge Advocate, Senior Master Sergeant Andrews, the First Sergeant of the 89th Mission Support Squadron at Andrews Air Force Base (the location of the abated rehearing) sent TSgt Hall a letter ordering him to immediately report to Andrews AFB on active duty for the purpose of attending the rehearing. This order was the prosecutor's response to TSgt Hall's request to the Military Judge that he be excused from being physically present at the rehearing. TSgt Hall made this request because he now lived in New York State and had recently secured very good employment working as a mechanic at a quarry. He had not yet earned leave at his new job, and, even though he could have requested "military leave," he was not anxious to explain to his new employer about his rehearing and court-martial conviction of 1991.

In response to the attempt to recall him to active duty, TSgt Hall petitioned the Court of Appeals for the Armed

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[1] The failure of the initial rehearing was problematic for the defense because a critical witness (the polygrapher) had traveled from Germany for the November rehearing. The polygrapher was due to retire from government service over in Germany, and his future availability was questionable.

Forces to grant an immediate "stay" of the order and to dismiss the case with prejudice for the prosecutorial misconduct associated with the attempted recall to active duty. *Hall v. United States* 1998 CAAF LEXIS 293 at Appendix E. The Court immediately granted the stay, stating, "the order issued recalling petitioner to active duty is hereby stayed pending further order of this Court." *Id.* The theory behind the request for a stay and the accompanying motion to dismiss was that the prosecutor was abusing military authority by using a recall to active duty in an attempt to retaliate against TSgt Hall for his request not to be present at the rehearing. The prosecutors aggravated their abuse of military authority by ordering a subordinate non-commissioned officer, Senior Master Sergeant Andrews, to issue the illegal order for the purpose of punishing TSgt Hall for exercising his rights.

On 15 January 1998, about a week after the stay had been granted, TSgt Hall petitioned the Court of Appeals for the Armed Forces to dismiss his case for lack of speedy trial. The Court of Appeals for the Armed Forces then ordered the Air Force prosecutors to "show cause" why the relief requested by the petitioner should not be granted." *Hall v. United States* 1998 CAAF Lexis 424 at Appendix G. The prosecutors responded after requesting an extension of time. *Hall v. United States* 1998 CAAF Lexis 192 at Appendix F. Both the motion to dismiss for prosecutorial misconduct and the for motion to dismiss for lack of speedy trial were pending before the Court of Appeals for the Armed Forces when this Honorable Court decided *United States v. Scheffer*, __U.S. __, 118 S.Ct. 1261 (1998).

REASON FOR GRANTING THE PETITION

The issue in this case is one of due process. Was TSgt Hall denied due process of law under the Fifth Amendment of

the Constitution because the Armed Forces Court of Military Appeals did not rule on his motions to dismiss? Certainly there is no issue that this Honorable Court's decision in *Scheffer* mooted the basis for TSgt Hall's rehearing ordered by the Court of Appeals for the Armed Forces.

The question presented by this request for certiorari is if the Scheffer decision mooted the undecided, non-frivolous, potentially dispositive, motions pending before the Court of Appeals for the Armed Forces at the time the underlying issue was resolved? One reason for thinking that the decision in *Scheffer* did not moot the motions is that if the Court of Appeals for the Armed Forces had ruled for TSgt Hall on either of his motions for dismissal, the dismissal would have been permanent and this Honorable Court's decision in Scheffer would not have reinstated the charges against TSgt Hall.

Certainly fundamental fairness and due process under the Fifth Amendment of the Constitution cannot be so happenstance that the internal docket of the Court of Appeals for the Armed Forces is going to determine the merits of TSgt Hall's motions. For fairness and due process to have any meaning TSgt Hall's two motions for dismissal need to be evaluated on their own merit, not the timing of the Court in reaching a decision.

The Prosecutors are Rewarded for Disobeying the Order of the Court

This case is of unusual importance. If the speedy trial motion is not decided on the merits, the prosecution, in real effect, will be rewarded for disobeying the rehearing order of the Court of Military Appeals for the Armed Forces. *Scheffer* was decided by the Court of Appeals for the Armed Forces only 12 days before *Hall. United States v. Scheffer,* 42 M.J.

442 (C.A.A.F. 1996). In *Scheffer,* like *Hall,* the Court ordered that the defense was entitled to an opportunity to lay a foundation for the proffered (exculpatory polygraph) evidence. *Hall* at 257, *Scheffer* at 445. The prosecutors appealed the *Scheffer* decision. They did not exercise their right to appeal *Hall.* Since they did not appeal, the Air Force prosecutors then had the obligation to obey the order of the Court.

Regardless of the possible reasonable anticipation of the Air Force prosecutors as to the ultimate decision of this Honorable Court on the polygraph issue, they still had the obligation to obey the order of Court of Appeals for the Armed Forces and to hold the ordered rehearing in a timely manner. They did neither, and by waiting for more than 400 days to even schedule a rehearing, they were able to delay the rehearing enough that this Honorable Court issued a decision in *Scheffer* and mooted the underlying basis for the rehearing. These prosecutors should not be rewarded for that "strategy," nor should TSgt Hall be afforded any less fundamental fairness because the Court of Appeals of the Armed Forces did not deal with the merits of his motions within the two and one-half months until *Scheffer* was decided.

This brief does not cite any cases concerning the status of pending dispositive motions when the underlying basis for the rehearing is resolved. Likewise, the Court of Appeals for the Armed Forces did not cite any cases to support its assertion that the requests for extraordinary relief were mooted, even after TSgt Hall requested it reconsider its initial decision. (CAAF decisions at Appendixes C & D) Of course, it is not necessary to cite a particular case in order to argue for the fundamental fairness that is inherent in the due process clause of the Constitution. By the lack of case law on point, it appears that the issue presented by this request for certiorari is one of first impression.

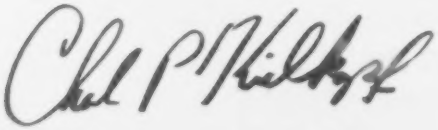
If this request for review is not granted the message that will be sent to military prosecutors is that the orders of the United States Court of Appeals for the Armed Forces do not have to be obeyed. That message does not serve the interests of fundamental fairness inherent in the due process clause of the Constitution nor does the message help preserve the good order and discipline that are necessary for the armed forces of a free society. If the guardians of the military justice system can simply ignore the orders of the highest military court, then there can be no military justice.

CONCLUSION

The United States Court of Appeals for the Armed Forces erred in not ruling on the merits of two requests for extraordinary relief that were pending before it on 31 March 1998 when this Honorable Court decided *U.S. v Scheffer.* In this case, the Air Force prosecutors ignored the rehearing order of the Court of Appeals for the Armed Forces for over 400 days. Fundamental notions of due process require fair treatment for those who serve in this nation's armed forces. Granting the petition for a writ of certiorari in the instant case would again demonstrate that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service". *Weiss v. United States,* 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

The petition for a writ of certiorari should be granted.

Respectfully Submitted



CHARLES P. KIELKOPF
Lt. Colonel, USAF
Counsel for Petitioner

APPENDIX A

UNITED STATES, Appellee

v.

Frank S. Hall (071-46-1611), Appellant

USCA Dkt. No. 93-0208/AF

Crim.App. No. 29863

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

ORDER

On further consideration of the granted issue in light of *United States v. Scheffer*, ___ U.S. ___, 118 S.Ct. 1261 (1998), it is, by the Court, this 29th day of September, 1998,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court

/s/ Thomas F. Granhan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (MCINTYRE)
Appellate Government Counsel (PETERSON)

APPENDIX B

UNITED STATES, Appellee

v.

Frank S. Hall, Technical Sergeant
U.S. Air Force, Appellant

No. 93-0208

Crim.App. No. 29863

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

Argued Dec. 6, 1995.

Decided Sept. 30, 1996.

Accused was convicted by general court-martial, Bruce T. Brown, J., of larceny of military property. The United States Air Force Court of Military Review affirmed. On petition for review, the United States Court of Appeals for the Armed Forces remanded for further consideration. The Court of Military Review Review, 1994 WL 681394, again affirmed. Review was granted. The United States Court of Appeals for the Armed Forces held that: (1) it had authority to ask judge advocate general of Air Force to return record of trial to Court of Criminal Appeals for further review, and (2) accused was entitled to opportunity to lay foundation for proffered evidence of exculpatory polygraph, even though evidentiary rule purported to bar absolutely results of such examinations from courts-martial.

Decision set aside; record returned for hearing before military judge.

Sullivan, J., filed opinion concurring in part and dissenting in part.

Crawford, J., filed dissenting opinion.

1. Military Justice ⊶ 1434, 1435.1

Court of Appeals for the Armed Forces has the authority to ask the Judge Advocate General of the Air Force to return record of trial to Court of Criminal Appeals for further review without finding legal error. 10 U.S.C.A. § 867.

2. Military Justice ⊶ 1023

Accused who testified on merits, thus placing his credibility in issue, was entitled to opportunity to lay foundation for proffered evidence of exculpatory polygraph, despite evidentiary rule purporting to bar absolutely results of such examination from courts-martial; foundation should include, inter alia, scientific validity of polygraphs, applicability of theory to accused's case, qualifications of examiner, proper functioning of equipment, and validity of questioning technique. Military Rules of Evid., Rule 707.

For Appellant: *Captain Michael L. McIntyre* (argued); *Colonel Jay L. Cohen* (on brief); *Captain Robert E. Watson.*

For Appellant: *Major Jane M.E. Peterson* (argued); *Major John H. Kongable* (on brief); *Colonel Jeffery T. Infelise.*

PER CURIAM:

Appellant was tried by a military judge sitting as a general court-martial at Spangdahlem Air Base, Germany. Contrary to his pleas, he was convicted of larceny of military property, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 921. He was sentenced to a bad-conduct discharge, confinement for 22 months, partial forfeitures, and reduction to E-4. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 6 months, partial forfeiture, and reduction to E-4. The Court of Military Review [1] affirmed.

Appellant petitioned this Court for review in March 1993, raising the following issue:

> WHETHER MILITARY RULE OF EVIDENCE 707,(2) WHICH EXCLUDES POLYGRAPH EVIDENCE, VIOLATES AN ACCUSED'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT AND COMPULSORY PROCESS UNDER THE SIXTH AMENDMENT.

We remanded the case to the Court of Military Review for consideration of the issue. 39 MJ 215 (1993). Here is

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[1] See 41 MJ 213, 229 n * (1994)

[2] Mil.R.Evid 707, Manual for Courts-Martial, United States (1995 ed), provides:

> (a) Nowithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any references to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

what the now Court of Criminal Appeals had to say about the case:

> The prosecution evidence at trial was that the appellant used his position as an aircraft maintenance supervisor to order tools, ostensibly for use in his jet engine repair shop, but which he took home for his personal use. The day before the trial began, the appellant took a polygraph examination conducted by a Department of Defense polygrapher. According to the polygrapher's report, the appellant did not indicate deception in answering relevant questions. At trial, the defense moved *in limine* to admit the results of the examination. The military judge excluded the test, relying on Mil.R.Evid 707(a), which prohibits the admission of polygraph results and related evidence.
>
> During our first review of this case, the appellant assigned no errors. However, our responsibility under Article 66(c), UCMJ, is to review the entire record and affirm only those findings of guilty and sentences which we find correct in law and fact. Finding no error, we affirmed the appellant's conviction and sentence in an unpublished *per curiam* opinion. Appellant petitioned the United States Court of Military Appeals for grant of review, asserting for the first time that Mil.R.Evid. 707 unconstitutionally restricted the accused's ability to defend himself at trial. On 14 July 1993, that court set aside our decision and remanded the case to us to consider that issue.

With all respect, we do not perceive any authority in Article 67, UCMJ that permits our decisions to be set without a determination that we committed legal error. Nor do we find

any authority for requiring this Court to consider issues an appellant chose not to raise before us during the Article 66 review. As has been recognized by the Court of Appeals for the Armed Forces, such "[p]iecemeal appellate litigation . . . is counterproductive to the fair, orderly judicial process created by Congress in Articles 66 and 67. . . ." *Murphy v. Judges of the U.S. Army Court of Mil. Rev.* , 34, M.J. 310, 311 (C.M.A. 1992). The Court of Appeals for the Armed Forces is certainly free to grant the appellant's petition and consider the constitutionality of Mil.R.Evid. 707(a), even though the appellant did not raise the issue before us. *Murphy*, 34 M.J. at 311 n. 3. But to remand the case to us to consider this issue, without any finding of error, only encourages shoddy appellant practice that "severely handicap[s]" us in fulfilling our statutory mandate. *Id.* This Court "cannot effectively carry out its . . . review . . . unless all issues known to or reasonably discoverable by appellant are litigated before that court in its initial review of the case." *Id.* at 311.

We have again reviewed the entire record in accordance with Article 66(c), UCMJ. The findings and sentence, as modified by the convening authority, are correct in law and fact. Accordingly, they are again AFFIRMED.

Unpub. op. at 1–3, 1994 WL 681394.

Obviously, the Court of Criminal Appeals did not see fit to answer clearly and cogently the question that we presented to it. We did not ask it idly; quite frankly, we were interested at the time in that court's view of the rule of law involved. *Compare United States v. Williams*, 39 MJ 555, 558 (ACMR 1994) (Mil.R.Evid. 707, Manual for Courts-Martial, United States (1994ed.), held unconstitutional), *with United States v. Nash*, ACM 30248, 1994, WL 564491 (A.F.Ct.Crim.App. Oct. 7, 1994) (unpub.) (Mil.R.Evid. 707 held constitutional). Nash had not been decided by the Air Force court at the time of our

remand order, and Williams had not been decided by the Army court.

After the Court of Criminal Appeal's affirmance in the instant case, appellant repetitioned this Court, raising the original issue. We granted that issue and specified the following additional issue:

> WHETHER UNDER ARTICLE 67, UCMJ THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES MUST MAKE A DETERMINATION OF LEGAL ERROR BEFORE AN ACTION BY A SERVICE COURT OF CRIMINAL APPEALS CAN BE SET ASIDE.

[1] Since our remand, we have had occasion to address the concerns of the lower court. We are quite satisfied that the United States Court of Appeals for the Armed Forces possesses the authority under Article 67, UCMJ, 10 USC § 867 (1994), to ask the Judge Advocate General of the Air Force to return the record of trial to the Court of Criminal Appeals for further review. *See United States v. Johnson,* 42 MJ 443 (1995). That is all we did here. Accordingly, we answer the specified issue in the negative.

[2] As to the granted issue, we hold that appellant is entitled to an opportunity to lay a foundation for the proffered evidence. *United States v. Scheffer,* 44 MJ 442 (1996); *United States v. Mobley,* 44 MJ 453 (1996); *United States v. Nash,* 44 MJ 456 (1996); *cf. United States v. Williams,* 43 MJ 348 (1996).

As in those cases, appellant testified on the merits, placing his credibility in issue, and he sought to introduce the results of an "exculpatory polygraph." The military judge refused to allow him an opportunity to attempt to lay a foundation for admission of the polygraph, ruling that Mil.R.Evid. 707 (which purports to bar absolutely the results

of polygraph examinations from courts-martial was a constitutionally permissible rule promulgated by the President.

According to the defense proffer and various documents submitted as appellate exhibits, it appears that the polygrapher was a Department of defense employee. Whether the polygrapher conducted the examination in his official capacity or in a private capacity is not however, apparent on this meager record. Thus, it remains to be determined whether admissibility should be conditioned upon submission to a prosecution polygraph. *United States v. Scheffer, supra* at 447.

We reiterate that we do not here decide "whether polygraph technique has made sufficient technological advancement in the seventy years since *Frye* [*v. United States,* 293 F. 1013 (D.C. 1923)] envisioned by Rule 702 and *Daubert* [*v. Merrell Dow Pharmaceuticals. Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]." *United States v. Scheffer, supra* at 446, quoting *United States v. Posado,* 57 F.ed 428, 433 (5th Cir. 1995). Foundation should include *inter alia,* the scientific validity of polygraphs, the applicability of the theory to appellant's case, the qualifications of the examiner, the proper functioning of the equipment, and the validity of the questioning technique. *See also United States v. Piccinonna,* 885 F.2d 1529 (11th Cir.1989); *United States v. Cato,* 44 MJ 82 (1996); *United States v. Berg,* 44 MJ 79 (1996).

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he or she will set aside the findings of

guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, the judge will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ 10 USC § 867 (1989), will apply.

SULLIVAN, Judge (concurring in part and dissenting in part):

I agree with the majority's decision except that portion permitting admission of polygraph-examination results at courts-martial. *See United States v. Williams* 43 MJ 348, 356–57 (1996).

CRAWFORD, Judge (dissenting);

As to the Granted Issue, see my separate opinion in *Untied States v. Scheffer,* 44 MJ 442, 449 (1996). As to the Specified Issue, see my separate opinion in *United States v. Townsend,* 43 MJ 05, 212 (1995).

APPENDIX C

Frank S. Hall (071-46-1611), Petitioner

v.

UNITED STATES, Respondent

USCA Misc. Dkt. No. 98-8008/AF

&

USCA Misc. Dkt. No. 98-8011/AF

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

ORDER

On consideration of appellant's motion for reconsideration of dismissal for lack of a speedy trial and prosecutorial misconduct, which the Court construes as a petition for reconsideration, it is, by the Court, this 26th day of August, 1998,

ORDERED:

That said petition for reconsideration is herby denied.

For the Court,

/s/ Thomas F. Granhan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (KIELKORF)
Appellate Government Counsel (BRESLIN)

APPENDIX D

Frank S. Hall (071-46-1611), Petitioner

v.

UNITED STATES, Respondent

USCA Misc. Dkt. No. 98-8008/AF

&

USCA Misc. Dkt. No. 98-8011/AF

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

ORDER

On consideration of the petition for extraordinary relief requesting that Petitioner be permitted to waive his presence at the evidentiary hearing ordered by this Court on September 30, 1996, *see United States v. Hall*, 45 MJ 255, 257 (1996); the petition for extraordinary relief alleging a speedy trial violation in that the aforesaid evidentiary hearing has not yet taken place; and the motion for expedited review, and in light of *United States v. Scheffer*, ___ U.S. ___, 11B S.Ct. 1261 (1998), is is, by the Court, this 22nd day of May, 1998,

ORDERED:

That the motion for expedited review is denied;

That the petitions for extraordinary relief are denied as moot;

That the decision of this Court in *United States v. Hall*, 45 MJ 255 (1996), is vacated; and

That the record of trial shall be immediately returned to this Court for further consideration.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (KIELKOPF)
Appellate Government Counsel (BRESLIN)

APPENDIX E

Frank S. Hall, Petitioner

v.

UNITED STATES, Respondent

Misc. No. 98-8008/AF

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

1998 CAAF LEXIS 293

January 8, 1998, Decided

OPINION: [*1]

On consideration of the Petition for Extraordinary Relief, the order issued recalling petitioner to active duty is hereby stayed pending further order of this Court.

APPENDIX F

Frank S. Hall, Petitioner

v.

UNITED STATES, Respondent

Misc. No. 98-8008/AF

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

1998 CAAF LEXIS 424

January 29, 1998, Decided

OPINION: [*1]

On consideration of the petition for extraordinary relief, it is ordered that respondent show cause by filing an answer on or before February 9, 1998, why the relief requested by petitioner should not be granted. Petitioner may file reply within 5 days of the filing of respondent's Answer to the order to show cause.

APPENDIX G

Frank S. Hall, Petitioner

v.

UNITED STATES, Respondent

Misc. No. 98-8011/AF

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

1998 CAAF LEXIS 192

February 18, 1998, Decided

OPINION: [*1]

Respondent's motion to extend time to file response to petition for extraordinary relief alleging a speedy trial violation granted.

APPENDIX H

UNITED STATES

v.

FRANK S. HALL, Technical Sergeant
FR071-46-1611 United States Air Force

ACM 29863 (f rev)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

1998 CAAF LEXIS 51

November 10, 1994, Decided

PRIOR HISTORY [*1] Sentence adjudged 27 November 1991 by GCM convened at Spangdahlem Air Base, Germany, Military Judge: Bruce T. Brown (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $500 pay per month for 6 months, and reduction to E-4.

COUNSEL: Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, and Lieutenant Colonel Frank J. Spinner.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Captain Jane M.E. Peterson, and Captain Timothy G. Buxton.

JUDGES: Before DIXON, YOUNG and BECKER, Appellate Military Judges.

OPINION BY: PER CURIAM:

OPINION:

PER CURIAM:

The United States Court of Appeals for the Armed Forces remanded this case to us to consider an issue first raised in the appellant's petition to that court for grant of review. We again affirm.

Despite his pleas, a military judge sitting as a general-court martial convicted the appellant of stealing military property of the United States, in violation of Article 121, UCMJ. n1 His sentence, as modified by the convening authority, extended to a bad conduct discharge, six months confinement, forfeiture of $500 per month for [*2] six months, and reduction to E-4. The prosecution evidence at trial was that the appellant used his position as an aircraft maintenance supervisor to order tools, ostensibly for use in his jet engine repair shop, but which he took home for his personal use. The day before the trial began, the appellant took a polygraph examination conducted by a Department of Defense polygrapher. According to the polygrapher's report, the appellant did not indicate deception in answering relevant questions. At trial, the defense moved in limine to admit the results of the examination. The military judge excluded the test, relying on Mil.R.Evid. 707(a), which prohibits the admission of polygraph results and related evidence.

n1 *10 U.S.C. § 921* (1988).

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During our first review of this case, the appellant assigned no errors. However, our responsibility under Article 66(c), UCMJ, n2 is to review the entire record and affirm only those findings of guilty and sentences which we find correct in law and fact. Finding no error, [*3] we affirmed the

appellant's conviction and sentence in an unpublished per curiam opinion. n3 Appellant petitioned the United States Court of Military Appeals for grant of review, asserting for the first time that Mil.R.Evid. 707 unconstitutionally restricted the accused's ability to defend himself at trial. On 14 July 1993, that court n4 set aside our decision and remanded the case to us to consider that issue.

n2 *10 U.S.C. § 866(c)* (1994).

n3 *United States v. Hall,* ACM 29863 (A.F.C.M.R. 22 Oct. 1992).

n4 Since renamed the United States Court of Appeals for the Armed Forces.

With all respect, we do not perceive any authority in Article 67, UCMJ, n5 that permits our decisions to be set aside without a determination that we committed legal error. No do we find any authority for requiring this court to consider issues an appellant chose not to raise before us during our Article 66 review. As has been recognized by the Court of Appeals for the Armed Forces, such "piece-mean appellate litigation. [*4] . . . is counterproductive to the fair, orderly judicial process created by Congress in Articles 66 and 67. . . ." *Murphy v. Judges of the U.S. Army Court of Mil. Rev., 34 M.J. 310, 311 (C.M.A. 1992).* The Court of Appeals for the Armed Forces is certainly free to grant the appellant's petition and consider the constitutionality of Mil.R.Evid. 707(a), even though the appellant did not raise the issue before us. *Murphy, 34 M.J. at 311 n.3.* But to remand the case to us to consider this issue, without any finding of error, only encourages shoddy appellate practice that "severely handicaps" us in fulfilling our statutory mandate. *Id.* This Court "cannot effectively carry out its . . . review . . . unless all issues known to or reasonably discoverable by appellant

are litigated before that court in its initial review of the case." *Id. at 311.* n6

n5 *10 U.S.C. § 867* (1994)

n6 Murphy was a capital case. However, the court expressly extended its sentiments to all cases passing through (as they were then called) the *Courts of Military Review. 34 M.J. at 311.*

[*5]

We have again reviewed the entire record in accordance with Article 66(c), UCMJ. The findings and sentence, as modified by the convening authority, are correct in law and fact. Accordingly, they are again.

AFFIRMED.

APPENDIX I

Rules for Courts-Martial 707 (b)(3)(D)

(D) *Rehearings.* If a rehearing is ordered or authorized by a appellate court, a new 120-day time period under this rule shall began on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

APPENDIX J

Excerpt from Transcript of Abated Rehearing 14 November 1997

military orders to attend the hearing if and when it resumes.

Finally, Captain Reilly will not be permitted to represent this accused without at least having made some contact with the accused. The cases are clear that this is ineffective assistance, and I will not be a party to assisting in creating needles appellate issues in a hearing ordered on appeal.

Is there any thing further? Trial counsel?

TC: No, ma'am.

MJ: Defense counsel?

DC 1: As far as the speedy trial motion, did you consider that when you were back there?

MJ: I don't think I can, counsel. I've ruled that this**—I'm not sure what it is I'm doing here right now, if this has been properly convened, and I don't think that any ruling I might make on speedy trial would be binding upon any subsequent proceeding;** and in addition to that, it was submitted by Captain Reilly, and I have ruled—it was presented to this court by Captain Reilly.

DC 1: The speedy trial motion, ma'am"

MJ: He marked it and he handed it to me.

DC 1: Okay.

MJ: And he has not made any contact with the accused. Now, I don't know what the appellate courts would say about Sergeant Hall, he's not going to be allowed to do anything more in this proceeding, and I think the record will probably reflect that I asked Captain Reilly

just before I came off the bench, "Have you had any contact with the accused?" and it was after he had already been present at table, and it was after he had already presented the motion. I think that's how the transaction occurred.

DC 2: Ma'am, if I may, you are correct. I have not met with the accused, but no, it was my co-counsel, not myself